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No. 113

In the Supreme Court of the United States

OCTOBER TERM, 1961

BUFORD MALONE, JR., PETITIONER

v.

JAMES A. BOWDOIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

ARCHIBALD COX,
Solicitor General,
ROGER P. MARQUIS,
RAYMOND M. ZAGONE,
Attorneys, Department of Justice,
Washington 25, D.C.

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OPINIONS BELOW

The district court's opinion (R. 16–18) is reported at 186 F. Supp. 407 under the name *Doe* v. *Roe*. The opinions of the court of appeals (R. 21–40, 52–58) are reported at 284 F. 2d 95 and at 287 F. 2d 282.

JURISDICTION

The judgment of the court of appeals (R. 41) was entered on October 25, 1960. A timely petition for rehearing *en banc* (R. 42, 44) was denied on February 23, 1961 (R. 58). The petition for a writ of certiorari was filed on May 23, 1961, and was granted on October 9, 1961 (R. 59). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an action may be maintained to eject a federal officer from lands claimed by the United States, where the officer is sued in his official capacity and is admitted to be acting only within his statutory authority, and there is no claim that he acts unconstitutionally.

STATEMENT

This is a suit by private parties to eject a federal forester from lands occupied by the United States under claim of title and administered on behalf of the United States by the Forest Service. The plaintiffs, respondents here, assert that there was a defect in the title when the United States acquired the land many years ago (in 1936), that they are the rightful owners, and that therefore they are entitled to eject the federal forester and occupy the land.

The proceeding was instituted by the respondents on May 7, 1959, in the Superior Court of Jasper County, Georgia, against the United States and petitioner, Buford Malone, Jr., (a Forest Service officer) (R. 3). The complaint—in terms of the fictitious form of ejectment known to the common law—asserted that Richard Roe (the petitioner and the United States) damaged John Doe (the respondents) in the sum of $25,000, in that on January 1, 1953, the respondents leased approximately 109 acres of land to themselves for a term of 50 years; that John Doe entered upon the land under the lease; and that "on December 1, 1953, said Richard Roe forcibly ejected and ousted your petitioner [the respondents here] from said lands and the possession thereof" (R. 3–4).

The complaint described the land claimed in general terms and concluded with a prayer "that process issue requiring said Richard Roe to be and appear at the next term of the Superior Court of said County to answer this complaint as provided by law" (R. 4). Process and service were directed to the petitioner and the United States (R. 2, 5, 6).

The petitioner and the United States then filed a petition for removal of the action from the state court to the District Court of the United States for the Middle District of Georgia, Macon Division, under the provisions of 28 U.S.C. 1442 (R. 1). The removal petition averred that the lands involved were acquired by the United States by deed on June 6, 1936; that the petitioner is a Forest Service Officer of the United States Department of Agriculture; that the petitioner's "official duties as a Forest Service Officer required him to be, and he was, in charge and in possession of the land described in said ejectment suit"; and that at all times mentioned, the petitioner "was acting solely under color of his office as a Forest Service Officer for the Forest Service, United States Department of Agriculture, and all his acts in connection with the matters charged in said complaint were committed by him under color of his said office" (R. 1-2).

In the federal court, the petitioner and the United States filed motions to dismiss (R. 9) and for a more definite statement (R. 10). In the motion to dismiss, it was contended that (1) the complaint failed to state a claim against the defendants upon which relief could be granted; (2) the state court did not have

jurisdiction over the defendants, since the proceeding was in substance and effect against the United States; and (3) the "United States has not consented to be sued or waived its immunity from suit and the complaint affirmatively shows that Buford Malone, Jr., is being sued as an agent and employee of the United States and as to him the suit is in substance and effect one against the United States; thus, the United States is an essential and indispensable party to the suit" (R. 9).

In their motion for a more definite statement, the defendants asserted that the respondents' complaint and claim were based on title and ownership of realty (but not present possession) and that the respondents claimed the right to possession of realty, while at the same time acknowledging the government's present possession and its denial of the respondents' right to possession (R. 10). The defendants also maintained that they should be furnished a full, accurate and detailed description of the claimed real estate, because the respondents' general description was so vague and ambiguous as to preclude responsive pleadings (R. 10–11, 12).[1] The government asserted that, under

[1] The motion explained that the United States owns several thousand acres of land within the boundaries of the respondents' general description in their complaint and that the defendants had no way of knowing the specific real estate claimed by the respondents (R. 11). The necessity for a more detailed description was elaborated by an allegation that the United States has made many valuable improvements on some of the land included in the boundaries of the respondents' general description and that the respondents failed to show whether some or all of the improvements had been made on property

Georgia law, by merely filing an answer it would admit possession, lease, entry, and ouster, but that it did not know whether it was in possession of all the land generally described by respondents (R. 11). To require the government to survey all of the generally described land in order to defend this suit was said to be expensive, unreasonable, and time-consuming, and would delay a prompt disposition of the case (R. 11–12).

The respondents amended their complaint by filing a plat (R. 14–15), but the government continued in its view that the description was insufficient. At the pre-trial conference, the parties agreed to delay trial and to extend the time for answering until after the question of the court's jurisdiction over this suit was decided. The respondents agreed to supply an adequate description if the district court determined it had jurisdiction.

After consideration of arguments and briefs on the question of jurisdiction—raised by the defendants' motion to dismiss—the district court granted that motion (R. 18). The court's opinion recited the government's contentions that the petitioner was at all times a Forest Service Officer, that his official duties required him to be in charge and in possession of the land described in the ejectment suit, that at all times the petitioner was acting solely under color of his office, and that all of the petitioner's acts in connection

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claimed by the respondents (R. 11). A deprivation of the government's right of set-off was feared if the government was not fully advised of the specific realty claimed by the respondents (R. 11).

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with the matters charged in the complaint were committed by the petitioner under color of his office (R. 16). The court then noted that, while the complaint "does not affirmatively show that Malone is being sued as an agent and employee of the United States, counsel for the plaintiff admitted at the pre-trial conference today that the above-quoted paragraphs 2 and 3 of the removal petition [R. 1–2] are true and correct. It does now appear, therefore, that Malone does not purport to act in the premises as an individual but solely as an official or employee of the sovereign" (R. 17). The opinion emphasized that the respondents failed to allege that the petitioner was acting beyond a statutory limitation upon his authority and that they affirmatively admitted that his official duties required him to be in charge and possession of the land involved (R. 17).

The respondents appealed. In their brief on appeal they referred to the chain of title through which they claimed the land: An 1857 will devised a life estate in certain land to Martha A. Sanders (*nee* Toland), with remainder over to her children (R. 44–45, 49–51). The respondents were said to be her children and grandchildren (R. 45, 50). In 1873, the devisee (Mrs. Sanders) conveyed the land, evidently in fee, to mesne grantors of the United States (R. 45, 50–51) which acquired the land in 1936 (R. 51). Mrs. Sanders died in 1928. The respondents were not said ever to have been in actual possession of the land (R. 45, 50–51).

The court of appeals, with Judge Rives dissenting, reversed the judgment of the district court (R.

41), the majority holding that the action could be maintained against the petitioner (R. 21–40). The court held that under the complaint and relevant Georgia statutes the respondents would be able to prove that (1) they were the true owners of the title; (2) the United States did not own any title which would defeat the respondents' claim; (3) the petitioner was in wrongful possession as agent of a principal (the United States) which did not have any claim thereto; (4) the petitioner ousted the respondents from their rightful possession; and (5) the respondents are entitled to money damages and possession during the claimed term of the lease-hold (R. 25). The opinion stated (R. 33):

> This is not a suit to try title to land. True, plaintiffs must show title in themselves as the basis for their possessory action, but the judgment sought does not involve title to land at all. * * *

It was also said that "the common law action of ejectment in Georgia involves possession alone" and that the only relief recoverable is possession and damages, although the writ of possession would not operate against third persons not joined in the suit (R. 25).

Judge Rives dissented for the reasons that, under the respondents' admissions recited in the district court's opinion, ousting the petitioner from possession would interfere with governmental functions; and that, under *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, the action was properly dismissed as

a suit against the United States to which it had not consented (R. 39–40).

A petition for rehearing *en banc* was denied by the majority of the same panel (R. 58). In denying the petition for rehearing *en banc,* the court declared that damages are not recoverable in this action against the federal officer and that possession alone is involved (R. 53).

SUMMARY OF ARGUMENT

I

This suit is in substance against the United States, which has not consented to be sued. The proceeding must therefore be dismissed as beyond the jurisdiction of the district court.

A. The action is one to oust petitioner, a United States Forest Service Officer, acting in his official capacity, from certain land. The land he occupies is part of a national forest acquired by the federal Government by purchase in 1936 and held since that time. There is no claim that petitioner acts in excess of his statutory authority or unconstitutionally. Instead, respondents admit that he acts solely in accordance with his delegated powers and, hence, that his action is "authorized" in the agency sense. The only contention is that the respondents, who have never possessed the land, are entitled to it under an old claim. In such circumstances the suit is clearly one against the United States and cannot be maintained without its consent, under the principles reaffirmed in *Larson* v. *Domestic & Foreign Corp.,* 337 U.S. 682.

The reliance of the respondents and the court of appeals on *United States* v. *Lee,* 106 U.S. 196, and *Land* v. *Dollar,* 330 U.S. 731, is misplaced. Those cases were urged upon and discussed by the Court in *Larson* and found distinguishable. The *Lee* case, decided in 1882 when there was no provision for the recovery of just compensation for the taking of property, was held to involve an unconstitutional taking. *Dollar* was rested on the allegation in that case that the federal officers were acting in excess of their statutory authority. In contrast, there is here an admission that the petitioner is acting solely within his properly delegated powers.

B. Dismissal is also proper because this is an unconsented suit to try the title of the United States to property which it claims and possesses. Both its title and possession are involved in this ejectment action which under Georgia law was clearly a suit to try title (as well as the right to possession). The established principle is that a suit in name against a federal officer, involving the possession and title of property claimed by the United States, is a suit against the sovereign.

II

A. It is not unjust to apply the doctrine of sovereign immunity to this class of case. The judgment sought will expend itself upon, and will interfere with the efficient administration of, the public domain. As recognized in the *Larson* case, *supra,* specific relief—here, ouster of the government from land occupied for federal purposes since 1936 under deed—is a direct interference with governmental activity; Congress has

rarely countenanced such direct interference when it has consented to suit.

B. A significant factor is that the prohibition of this type of suit will not leave the claimant unprotected. Congress has provided in the Tucker and Tort Claims Acts means by which many such claimants can be made whole through the recovery of compensatory damages. It is important, however, to recognize that where Congress has removed the immunity bar it has been in the form of suits against the United States directly and the relief authorized has been money damages only—not specific relief. And in giving consent to suit Congress can impose conditions and limitations which may be required to protect the public interest—restrictions which cannot be easily imposed when suit is permitted as a result of judicial action.

ARGUMENT

Respondents' action is a suit to oust petitioner, a Forest Service Officer, from land which the federal Government has held and occupied since 1936, under claim of full title, as an integral part of the federal domain. There is no challenge to the petitioner's statutory or constitutional authority to occupy the land on behalf of the United States, nor is there any claim that the land was acquired unconstitutionally. Respondents have never been in possession. This, like a private action for ejectment, is solely a dispute over chain of title: the respondents assert that their ancestor had no authority to dispose of the land in fee, while the United States answers that it has acquired good title impervious to this attack.

The government's plea to turn the respondents out of court for bringing an unconsented suit against the United States may, to some eyes, seem harsh and outmoded. But that defense has been maintained because we believe it to be imbedded in the Constitution, warranted by the historically accepted rules and doctrines of sovereign immunity, sustained in this instance by the demands of the public interest, and confirmed by the traditional congressional attitude toward the immunity bar. This is in essence a proceeding to eject the federal government from possession of land which it holds under a claim of title, for the United States can only occupy the property for public purposes through an officer such as petitioner. Judicial compulsion to oust the federal officer in these circumstances has consistently been denied by this Court. And when Congress has permitted suits against the United States for demands arising out of government action concerning realty, as in the Tucker Act and the Federal Tort Claims Act, Congress has carefully limited its consent to actions for money damages recoverable against the United States. In the field of government real property relations, it is important, in our view, that the bar of immunity be lifted no farther than Congress has expressly authorized or the Court has traditionally allowed. The private claimant is not left unprotected. Many, if not all, such claimants have a remedy under the Tucker Act or the Federal Tort Claims Act for compensatory damages.

5. Our view of the *Larson* case has been upheld by two other courts of appeals in comparable factual situations. In *Andrews* v. *White,* 221 F.2d 790 (C.A. 6), affirming 121 F.Supp. 570 (E.D. Tenn.), as in this case, the action was removed from a state court, specific relief was sought against United States Forest Service Officers to enjoin them from alleged trespasses upon land to which the plaintiffs claimed title,[1] the United States was not a party defendant, and the record disclosed that the federal officers acted solely within their statutory authority. The district court dismissed. Recognizing that the relief prayed for would operate against the United States in the administration of public lands and that the federal officers were exercising powers delegated to them by the United States, the Sixth Circuit affirmed the dismissal summarily, citing *Larson.*

The other case is *Cavanaugh* v. *Long,* 252 F.2d 959 (C.A. 9), affirming *Cavanaugh* v. *McKenzie,* 159 F.

(N.D. Cal.), affirmed *sub nom. Dollar* v. *United States,* 190 F.2d 547 (C.A. 9), certiorari denied, 342 U.S. 910; *United States* v. *Dollar,* 100 F.Supp. 881 (N.D. Cal.), injunction granted to preserve status quo pending appeal, 193 F.2d 114 (C.A. 9), reversed and remanded, 196 F.2d 551 (C.A. 9); application for stay of order to show cause in contempt denied, 341 U.S. 912; *Land* v. *Dollar, Sawyer* v. *Dollar,* and *In re Killion,* 190 F.2d 366 and 190 F.2d 623 (C.A. D.C.), certiorari granted and vacation of stay of contempt order denied, 341 U.S. 737–738, 342 U.S. 875, dismissed on motions, 344 U.S. 806.

[1] The district court there construed the action as one in ejectment or for injunctive relief. Construed as an action in ejectment, regarded in Tennessee as a suit to try title and right to possession, the action was held prohibited. 121 F.Supp. at 573 (E.D. Tenn.). As will be shown, *infra,* pp. 29–33, ejectment in Georgia is regarded the same way.

Supp. 555 (D. Nev.). The suit was removed from a state court and was for specific relief against the commanding officer of a military base. The plaintiff complained that the federal officer had obstructed a base road which the plaintiff had formerly used to reach his property. An easement was claimed. There was no allegation that the officer acted unconstitutionally or beyond his statutory authority or that the officer was not acting for the sovereign. It was plain that the officer had no personal interest in the asserted easement. The district court recognized and applied the principles urged by the petitioner here, in determining that the suit nominally against the officer was actually against the federal government in that the specific relief sought would take effect upon the public property. In affirming the dismissal *per curiam*, the Ninth Circuit adopted the district court's reasoning that the *Larson* case "culminate[s] all prior legal thinking on the subject of Governmental immunity * * *." 159 F.Supp. at 559. The district court concluded (at 560) that the specific relief "must, of necessity, expend itself on the public domain." That is the case here, and the judgment which the court of appeals authorizes will have that prohibited effect.

B. THE UNITED STATES IS AN INDISPENSABLE PARTY SINCE THE ACTION IS ONE TO TRY TITLE TO, AND RIGHT TO POSSESSION OF, PROPERTY TO WHICH THE UNITED STATES ASSERTS FULL CLAIM

An alternative way to view this action is as one to try the title and right to possession of property which the United States possesses and claims as its

I

THE ACTION SHOULD BE DISMISSED AS A SUIT AGAINST THE UNITED STATES TO WHICH IT HAS NOT CONSENTED

As the case came to ruling in the district court, that court properly dismissed the action, under the decisions of this Court, as an unconsented suit against the United States.

The basis of the respondents' claim does not appear upon the face of the complaint itself only because the complaint follows the fictitious form of ejectment pleading (R. 3). The question of the district court's jurisdiction, raised by the motion to dismiss (R. 9), enabled the court to inquire into the facts, as they actually exist, by reference to the process served (R. 5), the notice to the real defendants (R. 6), the removal petition (R. 1), and the respondents' pre-trial admissions (R. 16–17). See *Land* v. *Dollar*, 330 U.S. 731, 735, note 4, and authorities there cited. The district court was permitted to consider, without formal answer, the government's plea of its direct interest as bearing on the court's jurisdiction. The court of appeals therefore erred in concluding (R. 24, 57–58) that "the averments of the complaint must be taken as true in passing upon the motion to dismiss." The district court granted the motion to dismiss, not for failure to state a cause of action—to which the principle cited by the court below applies—but for a lack of jurisdiction appearing in the case at that juncture (R. 16–18). Moreover, the respondents concede that the action may not be maintained in name against the United States (R. 17) and the

court of appeals approved the district court's judgment dismissing the action insofar as the United States was concerned (R. 52, note 1). In determining whether the suit is against the sovereign, it is immaterial that the action has been dismissed as to the United States and that the United States is not now a formal party defendant.[2]

A. LARSON V. DOMESTIC & FOREIGN CORP. IS CONTROLLING

1. In the *Larson* case, 337 U.S. 682, the War Assets Administrator, believing the plaintiff-buyer had failed to comply with the terms and conditions of surplus coal, cancelled the agreement and proposed to sell the coal to another buyer. The plaintiff, claiming title to the coal, brought an action against the Administrator to enjoin the alleged "conversion" of its coal. This Court held the action to be in substance

[2] *Worcester County Co.* v. *Riley*, 302 U.S. 292, 296; *Ex parte State of New York, No. 1*, 256 U.S. 490, 500; *Louisiana* v. *McAdoo*, 234 U.S. 627, 629; *Oregon* v. *Hitchcock*, 202 U.S. 60, 68–69; *Minnesota* v. *Hitchcock*, 185 U.S. 373, 386; *Belknap* v. *Schild*, 161 U.S. 10, 25; *In re Ayers*, 123 U.S. 443, 487–492; *Hagood* v. *Southern*, 117 U.S. 52, 67; *Poindexter* v. *Greenhow*, 114 U.S. 270, 287. Whether a suit nominally directed against a federal officer is a suit against the United States is determined by the effect of the judgment or decree to be entered. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 687; *Worcester County Co.* v. *Riley*, 302 U.S. 292, 296; *Louisiana* v. *McAdoo*, 234 U.S. 627; *Minnesota* v. *Hitchcock*, 185 U.S. 373, 386. (At least to the extent *United States* v. *Lee*, 106 U.S. 196, 207, suggested in 1882 that the proposition that the United States may not be sued directly may be "limited to cases in which the United States are made defendants by name," the *Lee* case has since been overruled.)

one against the United States and hence barred by sovereign immunity (337 U.S. at 695):

> We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A Government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign.

Since the administration of sales contracts was within the delegated powers of the Administrator, his action in withholding delivery of the coal on the basis of his interpretation of the contract was "authorized", even if "illegal" as a matter of contract or tort law.[2]

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[2] It does not follow, however, that a suit against the sovereign may always be maintained through the expedient of suing the officer and alleging that he acts without proper authority. See *Larson*, 337 U.S. at 691, fn. 11. In the following decisions, the Court held the suit to be against the sovereign although it was alleged that the officer's conduct was without authority in the Constitution or in statute. *Mine Safety Co.* v. *Forrestal*, 326 U.S. 371, 374–375; *Morrison* v. *Work*, 266 U.S. 481, 484–486; *New Mexico* v. *Lane*, 243 U.S. 52, 58; *Lankford* v. *Platte Iron Works*, 235 U.S. 461, 476; *Louisiana* v. *McAdoo*, 234 U.S. 627, 632–634; *Goldberg* v. *Daniels*, 231 U.S. 218, 221–222; *Louisiana* v. *Garfield*, 211 U.S. 70, 74, 77–78; *Naganab* v. *Hitchcock*, 202 U.S. 473, 475; *Oregon* v. *Hitchcock*, 202 U.S. 60, 62–63, 69–70; *Hagood* v. *Southern*, 117 U.S. 52, 67–68; *Louisiana* v. *Jumel*, 107 U.S. 711, 720–723.

In deciding that the *Larson* case was a suit against the United States, the Court also discussed the criteria by which the determination could be made in suits for specific relief, expressly mentioning ejectment (337 U.S. at 687–688):

> it has long been established that the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign. In a suit against the officer to recover damages for the agent's personal actions, that question is easily answered. The judgment sought will not require action by the sovereign or *disturb the sovereign's property.* There is, therefore, no jurisdictional difficulty. The question becomes difficult and the area of controversy is entered when the suit is not one for damages but for specific relief: *i.e.,* the recovery of specific property or monies, *ejectment from land,* or injunction either directing or restraining the defendant officer's actions. In each such case the question is directly posed as to whether by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained * * * [This question] arises whenever suit is brought against an officer of the sovereign in which the relief sought from him is not compensation for an alleged wrong but, rather, the prevention or discontinuance, *in rem,* of the wrong. In each such case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against

> the individual officer. If it is, then the suit is barred not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction. [Emphasis added.]

The *Larson* opinion does not foreclose all suits for specific relief against federal officers, employees, or agents. The Court explained that suits against such officers, based on their individual or personal action, were outside the prohibited area. 337 U.S. at 689. Also, where the officer acts beyond a statutory limitation, the officer is vulnerable to a suit for specific relief—if the plaintiff specifies the statutory limitation upon which he relies. The Court emphasized that "it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies." 337 U.S. at 690. Further, where the claim is made that a statute or order under which the officer has acted is claimed to be unconstitutional, a suit for specific relief may be maintained. 337 U.S. at 690. However, if the federal officer's action is "authorized" in the agency sense, the suit is barred. 337 U.S. at 695. The Court made this clear when it stated (337 U.S. at 693):

> In a suit against an agency of the sovereign, as in any other suit, it is therefore necessary that the plaintiff claim an invasion of his recognized legal rights. If he does not do so, the suit must fail even if he alleges that the agent acted beyond statutory authority or unconstitutionally. But, in a suit against an agency of the sovereign, it is not sufficient that

> he make such a claim. *Since the sovereign may not be sued, it must also appear that the action to be restrained or directed is not action of the sovereign.* The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. *If he is exercising such powers, the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented.* [Emphasis added.]

2. The principles reaffirmed in the *Larson* opinion, after an exhaustive examination of the prior cases, are directly controlling here. In the present case, as in *Larson,* no question of the immunization of government officers against responsibility for their wrongful individual actions is presented. The compulsion which the Court is asked to impose is compulsion against the sovereign, although nominally directed against the petitioner. The judgment sought will "disturb the sovereign's property" which has been in its possession since 1936. The suit is not one for money damages but for specific relief, *i.e.,* ouster of the government and of the government official. There is no claim either that the petitioner was acting beyond the scope of his delegated powers or that those duties were unconstitutionally conferred. As the district court and the court of appeals recognized below, the petitioner's "official duties required him to be, and * * * [he] was in fact, in charge and possession

of the land described in the ejectment action under color of his office representing the United States" (R. 16–17, 23). On the basis of these considerations, the suit was barred in the *Larson* case because it was, in substance, a suit against the United States over which the district court, in the absence of consent, had no jurisdiction. The same conclusion should be reached here, whether the suit brought by respondents be merely for possession or to try title.

3. The sole attempt of the court of appeals to reconcile its decision with the *Larson* case is based upon this Court's introductory observation, "There is not involved any question of the immunization of Government officers against responsibility for their wrongful actions" (337 U.S. at 686; R. 36–37). The present case is different from *Larson*, the court of appeals believes, because here the claim is that the petitioner "is wrongfully and tortiously holding possession of * * * [the respondents'] lands as agent for the United States, which does not have the right of such possession" (R. 37). The purported distinction proves too much. As we have just noted (*supra*, pp. 16–17), *Larson* is explicit that "The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement", *i.e.*, the requirement that "the action to be restrained or directed is not action of the sovereign." In the sentence quoted by the court of appeals from *Larson*, this Court was merely separating (a) the question whether a suit, purportedly against an officer, is in effect a suit against the sovereign from (b) the quite different question whether the federal officer himself,

by virtue of his official position, has a personal immunity from suit and from personal liability for personal misconduct. The Court was not, as the court of appeals implies, suggesting that the officer's actions in *Larson* were not claimed to be "wrongful."[4] To the contrary, it was precisely in those terms that the Court itself stated the plaintiff's claim (337 U.S. at 692):

> If, says the respondent, an officer of the Government wrongly takes or holds specific property to which the plaintiff has title, then his taking or holding is a tort, and "illegal" as a matter of general law, whether or not it be within his delegated powers. He may therefore be sued individually to prevent the "illegal" taking or to recover the property "illegally" held.

Since the whole of the opinion in the *Larson* case was devoted to answering that very argument, the court of appeals' differentiation of the instant case on the ground that the petitioner's actions here are claimed to be "wrongful" and "tortious" is unsound.[5] It follows that the action is a suit against the United States without its consent under the rule of *Larson* v. *Domestic & Foreign Corp.*

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[4] Without an allegation of "wrongful" action the *Larson* action would have to be dismissed for failure to state a claim, without ever reaching the immunity issue. 337 U.S. at 689–691. See also *Yearsley* v. *Ross Constr. Co.*, 309 U.S. 18, 21; *Worcester County Co.* v. *Riley*, 302 U.S. 292, 296–297.

[5] As will be discussed, *infra*, pp. 29–33, Georgia ejectment is not solely a tort action. The fictitious pleading of lease, entry, and ouster are ignored and consequently cannot be considered as amou[illegible] to an allegation of "wrongfulness."

4. The court of appeals also relied on *United States* v. *Lee*, 106 U.S. 196, and *Land* v. *Dollar*, 330 U.S. 731, and found it "significant * * * that the Supreme Court [in *Larson*] did not overrule *Lee* or *Dollar*, essaying merely to distinguish those cases from the *Larson* case" (R. 37). It is true that the Court in the *Larson* opinion distinguished, rather than overruled, those cases, but it "distinguished" them in a way which deprived them of whatever applicability they might otherwise have had to the facts of this case. The Court stated in *Larson* that the *Lee* decision was based upon "the assumed lack of the defendants' constitutional authority to hold the land against the plaintiff," and was "a specific application of the constitutional exception to the doctrine of sovereign immunity" that property may not be taken by the United States without making provision for the payment of just compensation. 337 U.S. at 696–697. In *Larson*, the Court also noted that the *Lee* case was decided in 1882 when there was no remedy by which the plaintiff could obtain compensation for the alleged taking of his land as required by the Constitution. U.S. Const., Amend. V; 337 U.S. at 697, note 17. The *Lee* opinion itself makes this clear. 106 U.S. at 218–222.

There is no claim in this case that the petitioner's holding of the property constitutes an unconstitutional taking, but if such a claim were made it would be defeated by the present availability of a suit for compensation—not specific relief—against the United States directly under the Tucker Act, as pointed out in *Larson*. 337 U.S. at 697, 703, notes 17, 18 and 27; cf. *Hurley* v. *Kincaid*, 285 U.S. 95, 104. The court

of appeals repudiates the *Larson* discussion upon this point, stating that "this contention was specifically rejected in *Dollar, infra*" (R. 31). *Dollar*, however, rejected the contention only where federal officers "*unlawfully* seize or hold a citizen's realty or chattels * * *." 330 U.S. at 738. *Larson* stressed that in *Dollar* there was a claim that the officers' actions violated a statutory limitation on their authority. 337 U.S. at 702, note 26; 330 U.S. at 738. That is not the case presented here where the respondents admit that the petitioner is acting solely for the sovereign and within the limits of his authority.[6]

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[6] The subsequent history of the *Dollar* litigation is of interest in connection with the claim that a suit against an officer will not prejudice the rights of the United States. After this Court's decision in *Land* v. *Dollar*, 330 U.S. 731, a trial on the merits was held in the District Court for the District of Columbia and judgment entered against the Dollar interests. This was reversed by the Court of Appeals for the District of Columbia Circuit which ruled in favor of the Dollars. The United States then commenced, in its own name, an action in the Northern District of California to quiet its title to the stock. There then ensued a controversial series of proceedings, including a conflict between the Ninth and District of Columbia Circuits as to the jurisdiction of the former. Each considered orders to show cause in contempt and applications for restraining orders. The District of Columbia Circuit even suggested that the action in California be "voluntarily" dismissed if necessary to comply with its order. Finally, the controversy was settled out of court and the cause became moot, resulting in dismissal of the proceedings. See *Dollar* v. *Land*, 82 F.Supp. 919 (D. D.C.), reversed and remanded, 184 F.2d 245 (C.A. D.C.), certiorari and motion for rehearing denied, *sub nom. Land* v. *Dollar*, 340 U.S. 884, 948, motion for reconsideration continued, 341 U.S. 737, 738, motion withdrawn, 344 U.S. 807; *Land* v. *Dollar*, 188 F.2d 629 (C.A. D.C.), certiorari denied, 340 U.S. 948; *United States* v. *Dollar*, 97 F.Supp. 50

own. Since the petitioner is sued in his official capacity as a federal officer, he necessarily would be compelled to assert the title under which he occupies the land—the title of the United States. And since the United States can use and possess property only through its officers, the title and possession of the United States would be adjudicated if this ejectment action were allowed. While the United States may not be concluded by a judgment against the petitioner, its interests in managing the property would be affected and a cloud would be cast upon its title until directly litigated by the United States with the respondents. Moreover, the respondents obviously do not wish to contest possession, much less title, with the petitioner. He neither claims title in himself nor occupies the lands in his private capacity. The respondents conceded this in the district court (R. 16–17). Petitioner's ouster is not the respondents' real object, and the federal government's replacement of the petitioner by another forest service officer would not placate the respondents. It is relief against the United States—and not against the petitioner—which the respondents seek in reality and which the court of appeals declares may be granted.

Except perhaps for cases in which the title and possession of the United States violate the Constitution or a federal statute, the accepted rule is that a suit, like the present one, directly involving the possession and title of property in which the government has a substantial claim of interest, is a suit against the sovereign.

1. The Court recently declared (*Leiter Minerals, Inc.*, v. *United States*, 352 U.S. 220, 226) that "* * * under settled principles, title to land in possession of the United States under a claim of interest cannot be tried as against the United States by a suit against persons holding under the authority of the United States." This accords with the established law. In *Morrison* v. *Work*, 266 U.S. 481, the Court dismissed a suit to enjoin the Secretary of the Interior from carrying out certain acts of Congress. It was asserted that the acts unconstitutionally deprived the plaintiff and other members of the Indian tribe of property held by the United States for them as individuals. It was admitted that the acts were valid as to tribal property, which the United States claimed the property to be. The Court declared (at 485–486):

> The claim of the United States is, at least, a substantial one. To interfere with its management and disposition of the lands or the funds by enjoining its officials, would interfere with the performance of governmental functions and vitally affect interests of the United States. It is, therefore, an indispensable party to this suit. It was not joined as defendant. Nor could it have been, as Congress has not consented that it be sued. * * *

Other decisions of this Court also show that the United States is an indispensable party where its title and possession are in issue. All of the following cases decide that a suit directly involving the use, possession, or title of property in which the United States or a state claims an interest is a suit against the sov-

ereign. *Minnesota* v. *United States*, 305 U.S. 382, 386; *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 118; *Leather* v. *White*, 266 U.S. 592, affirming 296 Fed. 477 (C.A. 7); *New Mexico* v. *Lane*, 243 U.S. 52, 57–58; *Lankford* v. *Platte Iron Works*, 235 U.S. 461; *Goldberg* v. *Daniels*, 231 U.S. 218; *Hopkins* v. *Clemson College*, 221 U.S. 636, 648–649; *Louisiana* v. *Garfield*, 211 U.S. 70, 77–78; *Naganab* v. *Hitchcock*, 202 U.S. 473, 475–476; *Oregon* v. *Hitchcock*, 202 U.S. 60, 69–70; *Minnesota* v. *Hitchcock*, 185 U.S. 373, 386–387; *Stanley* v. *Schwalby*, 162 U.S. 255, 270, 272; *Belknap* v. *Schild*, 161 U.S. 10.

This rule is applicable not only where the United States' title or possessory right is conceded, but in every case where its claim is not merely colorable. *Louisiana* v. *Garfield, supra; Morrison* v. *Work, supra; Stanley* v. *Schwalby; supra; Oregon* v. *Hitchcock, supra; Naganab* v. *Hitchcock, supra; Goldberg* v. *Daniels, supra; New Mexico* v. *Lane, supra; Leather* v. *White, supra.* In the *Garfield* case, for example, the state filed a bill against the Secretary of the Interior and the Commissioner of the General Land Office to establish its title to certain lands claimed under the swampland acts. In response to a demurrer, lodged on the ground that the suit was against the United States, Louisiana argued (211 U.S. at 72–73):

> According to the theory of the present bill, the title to the lands here in controversy has by conveyance not only passed out of the United States into the State of Louisiana, but by reason of a certain congressional statute of limitation and repose the title so conveyed is no

> longer subject to attack or suit by or on behalf of the Federal Government, and, therefore, the United States is not, and cannot be made, the real party defendant, for the all-sufficient reason that the United States has no present, prospective or ultimate interest in the land whatsoever. If, therefore, the court shall find that the legal title to the lands in dispute has passed out of the United States into the State of Louisiana, then there cannot be any doubt of the jurisdiction of this court to entertain the suit.

In dismissing the bill for want of jurisdiction, the Court refused to let jurisdiction depend upon the complainant's allegations of title. Mr. Justice Holmes, for the Court, first assumed "for purposes of decision that if the United States clearly had no title to the land in controversy we should have jurisdiction to entertain this suit * * *." 211 U.S. at 75. He then briefly reviewed the state's arguments that it had good title to the land, stated that at least the case was doubtful, and concluded (211 U.S. at 77):

> But that doubt cannot be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard.

Thus it was definitely held that, although on the theory and allegations of the bill the United States had no interest, nevertheless the United States' claim was at least substantial and the suit must fail at the outset.

That is the case presented here, where the district court was apprised in an early phase of the case of the government's claim of interest (R. 1-3). The sub-

stantiality of that claim is manifest from the fact that this land was acquired in 1936 by the United States by direct purchase (R. 1) and that there could not have been an acquisition without an opinion of the Attorney General that the title was valid, based upon an examination of the abstract of title, deed, and related papers. R.S. 355, 40 U.S.C. 255, Appendix, *infra*, p. 41.

The same ruling on the defense of immunity was rendered in *New Mexico* v. *Lane*, 243 U.S. 52, 57–58, where the state asserted full title to certain lands formerly part of the public domain, and the United States controverted that claim. And in *Stanley* v. *Schwalby*, 162 U.S. 255, where the private plaintiffs and the defending officials engaged in a spirited dispute as to title to the land, the Court first held, without determining the merits, that the suit was against the United States and its property, and then "with a view to the ultimate determination of the case" (162 U.S. at 272), it upheld the government's claim on the merits. Similarly, in *Goldberg* v. *Daniels*, 231 U.S. 218, the private plaintiff claimed ownership of the vessel in himself, while the government official pleaded title in the United States. Illustrating that a mere claim of title in a private plaintiff is not controlling, the Court, without determining the issue of title, held that the suit must fail as one against the United States.

The net result of these authorities is that in this action, which is essentially to try title, the United States is an indispensable party which cannot be joined for lack of consent.

2. We think it clear that this ejectment action was converted into a suit to try title when title was claimed, on substantial grounds, to be in the United States. Both title and possession are basically involved in an ejectment action. The recovery of both, together with mesne profits and damages, is the general objective of the action. Stated another way, "title, however, must be established in order to warrant a recovery, and the establishment of such title, though nominally a mere incident, is in reality the object of the action. Hence, this convenient form of suit came to be adopted as the usual method of trying titles to land." Black, *Law Dictionary* (4th ed. 1951), Ejectment, p. 607. A recent declaration that the denial of a plaintiff's title puts the question of title in issue and converts ejectment into a suit to try title appears in Mr. Justice Douglas' dissenting opinion in *Parker* v. *Ellis,* 362 U.S. 574, 595:

> In Delaware, prior to its adoption of a modern code of civil procedure, the action of ejectment was based on a series of fictions. The declaration averred a lease to a fictitious lessee, and the ouster by a fictitious ejector "which when proven or admitted by the consent rule" left "the question of title as the only matter to be determined in the case." [Citation omitted.]

See also *Shapiro* v. *Christopher,* 195 F. 2d 785, 792–793 (C.A.D.C.).

The court of appeals' opinions in this case are founded upon the erroneous premise that this is not a suit to try title, possession alone being involved in Georgia ejectment (R. 25, 38–39, 53–55). That view

cannot be harmonized with the court of appeals' own statement that under the complaint and the relevant Georgia statutes the respondents will be able to prove title to be in themselves and that "the United States did not own any title" (R. 25). If the respondents, who are not in possession, may attempt to show that the United States does not have any title, the title of the United States must be in issue. In addition, a plaintiff out of possession must necessarily prove a title superior to the defendant to establish a right to possession, and the right of the defendant in this case (petitioner here) rests wholly on the title of the United States.

Moreover, the Georgia cases disclose that more than possession and damages are involved in a Georgia ejectment action. Declarations by the court below that the "purpose of the action is to eject the defendant from possession of the land," citing *Vinson* v. *Cannon*, 213 Ga. 339, 341 (R. 25, note 6); that "the common law action of ejectment in Georgia, as sought to be invoked and applied by the appellants in this case, involves possession alone" (R. 53); and that nothing in the Georgia law makes ejectment a suit to try title exclusively (R. 54), do not fully reflect the proof necessary to eject a defendant nor the real issue in Georgia ejectment.

Thus, in *Lopez* v. *Downing*, 46 Ga. 120, 125, the Supreme Court of Georgia described Georgia ejectment actions in this manner:

> It [Georgia ejectment] *is an action to try titles to land*—a fictitious proceeding, in which John Doe alleges that, having leased from A B certain

> land, Richard Roe, with sticks and stones, drove him out, and did him great damage. This looks very tortious; but the writ is to be served on the tenant in possession, and *he is required by law* * * * *to admit* [emphasis added], in effect, everything charged against him, to-wit: lease, entry and ouster. Having done this, admitted the trespass, he may defend—that is, the *real action* goes on.

The Supreme Court of Georgia repeated this view of a Georgia ejectment action in *Brewster* v. *Wooldridge*, 100 Ga. 305, 306, 308–311, in declaring (at 305–306):

> We are now to inquire whether, under the act referred to, the common law action of ejectment, *as a remedy for the recovery of the possession of land and the trial of titles to land, is abolished.*[*] It would be unprofitable here to state the origin, and to inquire into the history of this form of action. The best argument to be found in favor of its utility, and of its adaptability to the purposes to which it has heretofore been applied, is to be found in the fact, that *wherever in this State titles to land have been called in question, the legal profession has with singular unanimity turned to this as the best and simplest method of bringing to the atten-*

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[*] In 1799 the Georgia legislature simplified pleading requirements, but the statute was held not to have abolished the common law fictitious form of pleading in ejectment. The 1847 authorization of an alternative form of action to try titles expressly preserved the fictitious form of pleading. In 1893 the Georgia legislature again simplified the method of pleading. The issue in the *Brewster* case was whether the common law form of pleading in ejectment was thereby abolished. 100 Ga. at 306–307.

> *tion of the court the real issue, as to which party, whether plaintiff or defendant, had the better title to the premises in dispute.* By the application of the consent rule, which admitted lease, entry and ouster, and that other rule, adopted by the judges in convention, *which required the defendant,* before he pleaded to an action of ejectment, to admit his possession of the premises claimed, the courts have been enabled to strip the action of all superfluous matter, and bring the parties to a direct issue *upon title alone;* and notwithstanding all the legislation which has occurred heretofore in Georgia looking to a reform of our methods of procedure, this form of action, commended by considerations of utility and simplicity, has alone survived. [Emphasis added.]

The court continued (100 Ga. at 309):

> Both the action of ejectment as at common law, and complaint for land as the latter existed under our code, were originally mere possessory actions; but the rule of the superior court which first required the defendant, in an action of ejectment proper, to admit possession as a condition precedent to his being permitted to plead, *so far changed the character of the action as to eliminate entirely the question of possession,* and refer the contesting parties to the titles under which they claimed the right of possession.* [Emphasis added.]

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* The common law consent rule was adopted at a convention of Georgia judges in 1879. It was later included in the Georgia Codes of 1895, 1910, and 1933, and was adopted by act of the Georgia legislature. *Elliott* v. *Robinson*, 192 Ga. 682, 683.

The court then concluded (100 Ga. at 311):

> The wisdom of the General Assembly may suggest a better means for the trial of titles to land; but the writer ventures the opinion that human ingenuity has never yet been and never will be able to evolve a system which surpasses in utility the one now under consideration, or one more simple, when it is thoughtfully studied, carefully considered and well understood. [redacted]

See also *Sweat* v. *Atlantic Coast Line R. Co.*, 81 F.2d 492, 493 (C.A. 5); *Nottingham* v. *Elliott*, 209 Ga. 481, 482; *Ramey* v. *O'Byrne*, 121 Ga. 516, 520; *Bright* v. *City of Washington*, 95 Ga. App. 84, 86.

II

The Doctrine of Sovereign Immunity as Here Applied Is Not Unjust

Thus far, our argument has been concerned with the traditional conceptions and doctrines of sovereign immunity. We have tried to demonstrate that this case is governed by those conceptions and doctrines and that the court of appeals' decision denies the application of settled principles. But we do not rest solely on precedent or history. Our argument is also founded on governmental considerations which we now discuss.

A. The judgment sought by the respondents would expend itself on the public domain and interfere with the public administration

The doctrine of sovereign immunity does not now stand in high repute with many jurists and lawyers, but the conception is imbedded in the Consti-

tution and continues to be largely accepted by Congress and the state legislatures which have the power to consent to suits. The doctrine has, moreover, substantial justification when given its proper place. We believe that it is not unjust to apply it to this class of case. There is here neither an abrupt seizure of truly private property nor an abuse of governmental regulatory power. The government has been in possession since 1936 under deed (R. 1) and the land is being utilized by the Forest Service for the benefit of the general public. Nothing was adduced in the district court or the court of appeals to indicate that the respondents have ever been in possession. Indeed, the respondents themselves in their brief on appeal stated that their claim was based upon a will executed and recorded over 100 years ago in 1857 (see *supra*, p. 6, R. 44). The respondents' "contentions [of ownership]" are not to the contrary (R. 49–51). Nor is there any claim that the petitioner has acted unconstitutionally or in excess of his statutory authority. Rather, "there is a solemn admission that his official duties as a forest service officer required him to be and that he was in charge and in possession of the land involved" (R. 17).

For the government, maintenance of the immunity in cases of this type serves important practical ends. In *Dollar*, the Court referred to the "practical considerations reflected in the policy which forbids suits against the sovereign without its consent" (330 U.S. at 733) and there laid down a general

practical test which would designate this suit as one against the United States. The "essential nature and effect of the proceeding" are such that the judgment sought would both "expend itself on the public * * * domain" and "interfere with the public administration." 330 U.S. at 738. Since the United States can occupy its land only through its officers and agents, a court order ejecting the petitioner would in effect eject the United States. Under the decision below, the government's choice of officers who are to occupy and manage its property would likewise be thwarted. And the mere pendency of an action such as this may well prevent proper use, or disposition by lease or otherwise (if the government so desires), of the property—to the prejudice of efficient administration. Cf. *Jones* v. *Securities Commission*, 298 U.S. 1, 17–18.

The United States owns and occupies an enormous amount of land, used for all kinds of governmental purposes.[10] If private individuals can oust the government from possession on the ground of some defect in the government's title, a broad range of federal programs—from a national forest to land needed for space projects at Cape Canaveral—will conceivably be vulnerable to termination or to interference through prolonged litigation. Specific relief, as contrasted to money damages, creates serious

[10] The United States owns more than 407 million acres of land as part of the public domain or which have been acquired by purchase, condemnation, or otherwise. S. Doc. No. 100, 84th Cong., 2d Sess. (1956), p. 55.

problems recognized by this Court in its *Larson* opinion (337 U.S. at 703–705):

> It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend. But the reasoning is not applicable to suits for specific relief. For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. * * *
>
> There are limits, of course. Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions. But in the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen

> in being relegated to the recovery of money damages after the event.

Such affirmative judicial intervention in governmental affairs runs counter to the repeated admonition that "[t]he interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief * * *." *Decatur* v. *Paulding,* 14 Pet. 497, 516; *Perkins* v. *Lukens Steel Co.,* 310 U.S. 113, 131–132. That fundamental principle operates to compel the designation of an action for a judgment which would interfere with the public administration as a barred suit against the United States.

In addition, the *Larson* opinion acknowledges that it is for the legislature, not the courts, to choose the instances in which specific relief should be made available against the sovereign (337 U.S. at 705):

> It is argued that a sales agency, such as the War Assets Administration, is not the type of agency which requires the protection from direct judicial interference which the doctrine of sovereign immunity confers. We do not doubt that there may be some activities of the Government which do not require such protection. There are others in which the necessity of immunity is apparent. But it is not for this Court to examine the necessity in each case. That is a function of the Congress. The Congress has, in many cases, entrusted the business of the Government to agencies which may contract in their own names and which are subject to suit in their own names.

> In other cases it has permitted suits for damages, but, significantly, not for specific relief, in the Court of Claims. The differentiations as to remedy which the Congress has erected would be rendered nugatory if the basis on which they rest—the assumed immunity of the sovereign from suit in the absence of consent—were undermined by an unwarranted extension of the *Lee* doctrine.

Congress has the responsibility of extending remedies, and it can do so in properly selective fashion. Thus far, it has normally restricted relief to money damages only. The Tucker Act authorizes no specific relief against the government, and the Federal Tort Claims Act is also restricted to claims for money damages only. See 28 U.S.C. 1346(b); 60 Stat. 842 (Sec. 410(a)). These legislative consents-to-suit indicate the consistent congressional policy against relief other than money damages. This express policy, reflecting the needs of public administration, properly bears much weight in deciding whether suits like the instant suit for affirmative relief against a government officer should be viewed as unconsented suits against the United States.

B. THE PRIVATE CLAIMANT IS NOT LEFT UNPROTECTED

Barring the private claimant from obtaining specific relief against the government in these land cases does not leave him unprotected. First, the Congressional requirement that the Attorney General must approve the title on all land acquisitions (Appendix, *infra*, p. 41), while imposed for the protection of the United States, in practical operation protects claimants in al-

most all cases since defects in the title the government purchases must be cleared or it must be concluded that the infirmities will not jeopardize the interests of the United States—meaning that the outstanding interest will be respected."[11]

Furthermore, it is often possible to sue for damages under the Tucker Act, 28 U.S.C. 1346(a) and 1491, or the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*[12] A suit in the Court of Claims or in the federal district court seeking money damages would give the claimant as complete a remedy as he is entitled to in the circumstances, considering that the government has the additional power of eminent domain. If the government agency did not desire to retain the land after a finding that the United States does not have title, that fact could be made known in partial defense of a Tucker Act proceeding. We mention this factor because, absent express indication of intent by authorized government officers, it would be somewhat doubtful whether the taking was temporary or permanent. See *United States* v. *Causby,* 328 U.S. 256, 267–268; *United States* v. *Dow,* 357 U.S. 17, 21. If permanent retention of the land were needed and authorized for governmental purposes, there could then be a taking of the fee title.

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[11] The government is also usually willing to bring its own actions to quiet titles to lands in its possession where substantial, reasonable, and active claims may be asserted by private citizens. See, *e.g.*, *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220; *United States* v. *Patterson*, 206 F. 2d 345 (C.A. 5).

[12] From the facts as they appear, there is every indication that in this instance a Tucker Act or Tort Claims Act suit was long since barred.

The court of appeals below, citing the instances "in which Congress has specifically withdrawn sovereign immunity" (R. 32), seems to consider this type of legislation as warrant for extending the waiver of sovereign immunity by judicial action. But the court forgets that congressional waivers have not been without significant qualifications and pursuant to a consistent congressional policy. Claims under the Tucker Act, for example, must be asserted within six years after the right of action first accrues. 28 U.S.C. 2401(a). In the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671, *et seq.*, Congress, in addition to imposing a short limitation period, excised a large number of claims, including actions based upon the exercise by federal officers of discretionary functions. 28 U.S.C. 2401(b) and 2680. Above all, as we have already emphasized, a dominant policy has been to permit suits for money damages only and in general not to allow specific relief against the government.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the court of appeals should be reversed and that the district court's dismissal of the respondents' ejectment suit for lack of jurisdiction should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ROGER P. MARQUIS,
RAYMOND N. ZAGONE,
Attorneys.

DECEMBER 1961.

APPENDIX

R.S. 355, as amended, 40 U.S.C. 255, provides:

> No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy yard, custom-house, lighthouse, or other public building of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title.
>
> Notwithstanding the provisions of this or any other law, whenever the average value of any lands or interests in land to be acquired by or on behalf of the United States under a single option or contract of sale does not exceed $10 per acre (hereinafter referred to as "low-value lands"), the title may be accepted subject to such infirmities as, in the opinion of the Attorney General, may, without jeopardizing the interests of the United States, be left for removal by condemnation or other appropriate proceedings, if and when necessary: *Provided,* That the total value of any lands or interests to be acquired under a single option or contract of sale subject to an infirmity does not exceed $3,500. No public money shall hereafter be expended for the acquisition of such low-value lands or interests in land by or on behalf of the United States for any purpose until the written opinion of the Attorney General has been had approving the title subject, if expedient, to infirmities as herein provided. However, no money in excess of $2,500 shall be expended for the construction of buildings, works, or other improvements (except roads, trails, and fire-

protection improvements) on any site tract, or parcel of land the title to which is subject to infirmities, until the written opinion of the Attorney General in favor of the validity of the title has been had as in the case of other lands. For the purpose of this section, values of lands and interests in land shall be determined by the consideration paid or to be paid.

The Attorney General is authorized to approve the title to easements or rights-of-way to be acquired by or on behalf of the United States, subject to such infirmities as, in his opinion, will not jeopardize the interests of the United States.

Nothing in this section shall be construed to limit the authority now or hereafter delegated to any officer in exercising the power of eminent domain for or on behalf of the United States, to take title to or possession of or to expend money for or upon any land or interest in land, or to expend money as security for an ultimate award in advance of final judgment in any proceedings to determine just compensation; nor shall this section be construed to preclude any acquiring agency from expending money for the erection of any preliminary and temporary structure upon any land.

The head or other authorized officer of any department, independent establishment, or agency, shall procure any evidence of title which the Attorney General may deem necessary, and the expenses of procurement, except where otherwise authorized by law or provided by contract, may be paid out of the appropriations for the acquisition of land or out of the appropriations made for the contingencies of the acquiring department, independent establishment, or agency.

The Attorney General may, in his discretion, base any opinion as to title required either by this section or any other law upon either or both of the following: Certificates of title of

title companies or such evidence of title as he may deem satisfactory.

The foregoing provisions of this section shall not be construed to affect in any manner any existing provisions of law which are applicable to the acquisition of lands or interests in land by the Tennessee Valley Authority; and nothing in this section shall be construed to affect in any manner any authority which the Secretary of the Army, the Chief of Engineers, or the Secretary of the Interior have under the provisions of law in force on October 9, 1940, with respect to the approval by them of title to land or interests in land acquired by the Department of the Army or the Department of the Interior, as the case may be. Nor shall the foregoing provisions of this section, or the provisions of any other law, be construed to require any opinion of the Attorney General in connection with the acquisition or improvement of easements and rights-of-way for military or naval purposes; or for the acquisition or improvement of easements and rights-of-way by the Department of Agriculture for forest and other conservation purchases where the cost of any such easement of right-of-way acquired under a single instrument of conveyance and the cost of any improvement thereon does not exceed $2,500; and the Attorney General may, in his discretion, waive the requirement for his opinion in connection with the acquisition or improvement of easements and rights-of-way for other purposes when, in his opinion, such waiver will not jeopardize the interests of the United States.

Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer or any department or independent establishment or agency of the

Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.

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